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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 JUAN J. CHAN,

11 Petitioner,

12 v.

13 M.S. EVANS, Warden,

14 Respondent.  
15

No. C 08-4399 MMC (PR)

**ORDER OF DISMISSAL**

16 On September 19, 2008, petitioner, a California prisoner proceeding pro se, filed the  
17 above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has  
18 paid the filing fee. For the reasons set forth below, the Court finds the petition is subject to  
19 dismissal because petitioner has not sought or obtained authorization to file a second or  
20 successive petition under 28 U.S.C. § 2244(b)(3).

21 **BACKGROUND**

22 In 2000, in the Superior Court of Santa Clara County, petitioner pleaded guilty to  
23 numerous felonies. He was sentenced to a term of twenty-two years in state prison. After  
24 petitioner's state collateral challenges to his conviction and sentence were denied, petitioner,  
25 who was represented by counsel, filed, in 2003, a federal habeas corpus petition in this  
26 district. See Chan v. Lamarque, No. C 03-1156 (MMC). After full briefing by the parties,  
27 the Court denied the petition on the merits, finding: (1) petitioner's due process rights were  
28 not violated when he admitted to having suffered prior convictions, and (2) petitioner did not

1 receive ineffective assistance of counsel with respect to counsel's advice concerning the  
2 prior-conviction allegations and the consequences of petitioner's guilty plea. See id. (Order  
3 Denying Petition for Writ of Habeas Corpus, filed Apr. 9, 2004). Subsequently, both this  
4 Court and the Ninth Circuit denied petitioner's requests for a certificate of appealability. See  
5 id. Docket Nos. 26 & 31.

6 By the instant petition, petitioner claims the sentence he received in 2000 violates  
7 state law because the sentence was enhanced with a prior prison term to which the "Five-  
8 Year Washout" provision of California Penal Code section 667.5(b) should have been  
9 applied. In particular, although Penal Code section 667.5 provides that a prison term for a  
10 new offense may be enhanced where the defendant has served a prior prison term, under  
11 subsection (b), "no additional term shall be imposed . . . for any prison term served prior to a  
12 period of five years in which the defendant remained free of both prison custody and the  
13 commission of an offense which results in a felony conviction." Cal. Penal Code § 667.5(b).  
14 Petitioner claims the five-year provision should have been applied to the time period  
15 following his discharge from parole in 1988. (Pet. at 6.)

### 16 DISCUSSION

17 Where a claim presented in a second or successive habeas corpus petition under  
18 28 U.S.C. § 2254 has been presented in a prior petition, such claim must be dismissed.  
19 28 U.S.C. § 2244(b)(1). Where a claim presented in a second or successive habeas corpus  
20 petition under § 2254 has not been presented in a prior petition, such claim likewise must be  
21 dismissed, unless: (1) the claim relies on a new rule of constitutional law, made retroactive to  
22 cases on collateral review by the Supreme Court, or (2) the factual predicate for the claim  
23 could not have been discovered previously through the exercise of due diligence, and the  
24 facts underlying the claim would be sufficient to establish by clear and convincing evidence  
25 that, but for constitutional error, no reasonable fact-finder would have found the petitioner  
26 guilty of the underlying offense. Id. § 2244(b)(2). Before a second or successive habeas  
27 petition may be filed in the district court, the petitioner must first obtain from the Court of  
28 Appeals an order authorizing the district court to consider the petition. Id. § 2244(b)(3)(A).

1 The instant petition presents a claim challenging the sentence that was the subject of  
2 petitioner's prior federal habeas corpus petition. Consequently, petitioner may not proceed  
3 with such claim until he has sought or obtained an order from the Ninth Circuit Court of  
4 Appeals, authorizing him to file a second or successive petition in the district court.  
5 Accordingly, the instant petition will be dismissed without prejudice to petitioner's refiling  
6 the petition if he obtains the necessary order.


7 **CONCLUSION**

8 For the reasons stated above, the petition is hereby DISMISSED, pursuant to 28  
9 U.S.C. § 2244(b) and without prejudice, as a second or second successive petition.

10 The Clerk shall close the file.

11 IT IS SO ORDERED.

12 DATED: November 3, 2008

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14 MAXINE M. CHESNEY  
15 United States District Judge  
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